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No. 99-783

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

IN THE
Supreme Court of the United States

DONALD RAY BUCHANAN,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington Supreme Court

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PETITIONER'S REPLY BRIEF

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A. The Washington Supreme Court Uniquely Applied The "Reserved Rights" Doctrine to Limit Treaty Hunting Allowed in "Open and Unclaimed" Lands.

The "reserved rights" doctrine of *Winans* and *Winters*, an accepted rule of Indian treaty construction, was misused below. Although the Idaho and Montana cases cited by Respondent and the Washington Supreme Court permit hunting under the Stevens Treaties in ceded lands and traditional hunting grounds, none of these cases uses the "reserved rights" doctrine to limit "open and unclaimed" lands to these areas.

In *State v. Arthur*, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954), the court states:

> The only question presented on this appeal is whether the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855 . . .

261 P.2d at 136. The Idaho Court affirmed dismissal, rejecting the State's "equal footing" argument, but was not called on to decide whether the Nez Perce could hunt in "open and unclaimed" lands outside their ceded territory.[1]

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[1] *Arthur* is significant for its reliance on treaty minutes to determine the "context" of the treaty and the intent of the parties:

> Governor Stevens, speaking before the Council, said:
>
> "You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. . . . You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation."
>
> Governor Steven also stated, when addressing himself to Looking Glass, one of the spokesmen of the Indians, as follows:
>
> "I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at

In *State v. Coffee*, 556 P.2d 1185 (Idaho 1976), the court ruled that the non-treaty Kootenai Indian Tribe's aboriginal right to hunt was limited by the Hellgate Treaty of 1855 to "open and unclaimed" lands, even though the tribe was not a signatory. The case does not hold that the treaty tribes' right to hunt in "open and unclaimed" lands is confined to their ceded territory or to traditional hunting grounds.

In *State v. Stasso*, 563 P.2d 562 (Mont. 1977), the court affirmed the lower court's dismissal of charges, holding that National Forest lands where the defendant was hunting were "open and unclaimed." The *Stasso* court did not have to decide whether "open and unclaimed" lands were confined to the ceded territory or to traditional hunting grounds.

Finally, the case of *United States v. Taylor*, 3 Wash. Terr. 88, 13 P.333 (1887), which interprets "the right of taking fish at all usual and accustomed places," does not support Respondent's position. In fact, it helps illustrate one of the reasons the fishing right was confined to traditional areas, while the hunting right was not. The fishing right, which can impose a servitude of access on settled lands, had to be confined to usual and accustomed places, or it would hopelessly encumber "all the shore line of the territory." *Taylor*, Respondent's App. B at 13a. On the other hand, because the hunting right was confined

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any of the fishing stations, that he can kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers."

Arthur, supra, 261 P.2d at 140-141. The Washington Court, on the other hand, rejected the plain language of the Stevens Treaties without any reference to the treaty minutes or to historical findings, relying on a law review article by student author Bradley I. Nye, *Where Do The Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 Wash. L. Rev. 175 (1992).

to "open and unclaimed" lands, it could not create a servitude on settled lands, and did not have to be limited to traditional areas.

B. The Washington Supreme Court's Position Was Rejected By The Eighth Circuit.

Although a number of previous treaties had confined tribal off-reservation hunting to ceded lands,[2] including the 1837 Chippewa Treaty analyzed in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999), the Stevens Treaties have no language limiting or reserving tribal hunting within ceded lands.

As with the Wisconsin Chippewa Bands in *Mille Lacs*, there is no evidence that the Nooksack Tribe had "exercised" its right to hunt throughout the ceded lands of the Point Elliot Treaty. Nevertheless, as Respondent concedes at page 9 of its Brief in Opposition, "[I]t has been clear in Washington for some time Indians may hunt [off-reservation] on ceded land." This is irreconcilable with the Washington Supreme Court's unique interpretation of the reserved rights doctrine.

The Washington Court's position—that treaties only reserve the right to hunt in locations that had been traditionally hunted at the time the treaties were signed—was rejected by the Eighth Circuit when it determined that the plain language of the Chippewa Treaty reserved the Wisconsin Chippewa's right to hunt throughout the ceded lands in Minnesota, where they had not historically hunted. *Mille Lacs, supra*, 124 F.3d at 933.

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[2] These treaties, e.g., the Potowatomi Treaty 1826, Miami Treaty 1826, Chippewa Treaty 1829, Pawnee Treaty 1833, and the Ottawa Treaty 1836, were made with Eastern tribes lacking the bargaining power of the Washington tribes, who had never been at war with the settlers.

C. The Ninth Circuit Has Rejected Washington's "Reservation of Rights" Argument Several Times.

In *United States v. Washington,* 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd in relevant part,* 759 F.2d 1353, 1358-59 (9th Cir.) (*en banc*), *cert. denied,* 474 U.S. 994 (1985), Washington State argued that "because hatcheries were neither in existence nor in the parties' contemplation when the [Steven Treaties] were signed, the Indians could not have reserved the right to take hatchery fish." 506 F. Supp. at 200. Finding no language or intent in the Stevens Treaties to limit the fishing right to treaty-time practices the district court rejected Washington's argument.

> This claim contravenes considerable case law and is directly refuted by *Winans,* the leading case on which the state relies regarding the nature of reserved rights. . . .
>
> "New conditions came into existence, to which those (fishing) rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away."

506 F. Supp. at 200.

The Ninth Circuit has also rejected several other attempts by Washington to limit the fishing right of the Stevens Treaties to treaty-time practices under the "reserved rights" doctrine. *See* Cert. Petition at 20-22. These cases cannot be distinguished by labeling the right to hunt a "temporary" right without any support from the treaty language, treaty minutes or caselaw.

Although it was clearly contemplated by the parties to the Stevens Treaties that the extent of "open and unclaimed" lands would diminish as lands were claimed and occupied, there is no indication in the treaty minutes that

the parties intended the hunting right to disappear someday. Based on earlier settlement practices, the United States had no reason to assume that all the lands in the Washington Territory would someday be claimed and occupied. Otherwise, Governor Stevens' assurances to tribal leaders, *see, e.g.*, note 1, *supra*, would have been very misleading.

As with the Indians' right to fish, the right to hunt had to accommodate new conditions as they came into existence. Limiting that right to "open and unclaimed" lands was a commonsense solution to protect competing rights. The Indians would maintain their right to wander and hunt, while the white settlers were afforded security and privacy in the use of lands they had acquired and staked out. *See State v. Chambers*, 81 Wn.2d 929, 935, 506 P.2d 311 (1973). This accommodation affected neither the permanency nor the importance of the right to hunt.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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